No. 95-1227

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Petitioner,

vs.

PAUL DOUCET, RUSSELL DOUCET, MICHAEL DOUCET and HERBERT CHAMPAGNE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS MICHAEL SCHMIDT
Counsel of Record
WAYNE E. GARRETT
Of Counsel
LAW OFFICES OF
DOUG SCHMIDT, APLC
Attorneys for Respondents
335 City Park Avenue
New Orleans, Louisiana 70119
(504) 482-5711

8336
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Does the failure to raise the issue of statutory privilege under 23 U.S.C. § 409, as it applies to materials allegedly produced under 23 U.S.C. § 152, at the trial level, in the appellate court or before the state Supreme Court, deprive petitioner of its right to seek a writ of certiorari on such a question.

2. Is the 1995 amendment to the statute properly before this Court because the amendment was enacted after the final state court judgment and was never raised before the state court; in the alternative, does the addition of the word "collect" or "collected" in the statute make any change in materials and/or documents described as excluded under 23 U.S.C. § 409.

3. Does the statutory privilege against the discovery and admissibility created by 23 U.S.C. § 409 apply to evidence demonstrated to have been gathered or prepared by other agencies and not in any way connected with any program under 23 U.S.C. §§ 130, 144 and/or 152.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Factual Procedural Overview 1

Reasons for Denying the Writ 2

I. The issue of the privilege of Section 23 U.S.C. § 409 as it applies to "reports, surveys, schedules, lists or data" compiled pursuant to 23 U.S.C. § 152 was never raised at the state court level nor in the appellate courts nor in the application of the state Supreme Court. 2

II. The 1995 amendment of 23 U.S.C. § 409, adding the words "or collected" after the word "compiled", does not present any change in the law and is not properly before this Court as the amendment was never raised at the state court level; further, that the amendment would not have affected the admissibility of any of the evidence presented to the lower courts; in the alternative, any such change would be substantive because it would deprive petitioner of state tort rights. ... 5

III. The decision of the State Court of Appeals is correct in its interpretation of 23 U.S.C. § 409, and its admission of evidence including police reports and other documents not compiled by the DOTD. 7

Contents

Page

IIIA. The statutory privilege created by 23 U.S.C. § 409 should be read as integrated with the other sections of that title and the programs arising under such sections, namely §§ 130, 144 and 152. 9

IIIB. The DOTD interpretation would bar consideration of evidence, not compiled or collected under any applicable statutory provision, preventing consideration by the court of admissible evidence. 11

IIIC. The evidence sought to be excluded was prepared by state experts and not used for any purpose pursuant to 23 U.S.C. §§ 130, 144 and/or 152. .. 18

IIID. The cumulative effect of the evidence, including police reports, bridge tender complaints, independent observations by experts, adduced at trial as well as other admissible evidence confirms the court's ruling. 19

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612, 421 U.S. 210 (1975) 16

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) 16

Contents

Page

Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974) 15, 17

Cousins v. Berteaut, 22nd JDC case number 89-2066 .. 20

Fox v. Parker, 626 F.2d 351 (1980) 16

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992) 16, 17

Hamilton Co. v. State of Massachusetts, 73 U.S. 632, 6 Wall. 632, 18 L. Ed. 904, U.S. Mass. 1867 ..... 2, 5

Hormel v. Helvering, 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037, *cert. granted*, 61 S. Ct. 35, 311 U.S. 626, 85 L. Ed. 397 3

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990) 16

Kitts v. Norfolk and Western Railway Co., 152 F.R.D. 78 (S.D.W. Val. 1993) 10

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . 16

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992) 17

Martinolich v. Southern Pacific Transp. Co., 532 So. 2d 435 (La. App. 1 Cir. 1988) 14

Contents

Page

Southern Pacific Transport v. Yarnell, 890 P.2d 611 (Ariz. 1995), *writ refused*, __ U.S. __, 116 S. Ct. 352 ... 7, 8, 14, 21

United States v. Nixon, 413 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) 10

United States v. Schooner Peggy, 1 Cranch 103, 2 L. Ed. 49 (1801) 15

Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678, U.S. La. 1875 3

Wiedeman v. Dixie Elec. Membership Corp., 627 So. 2d 170 (La. 1993) 6, 7, 11, 12

Statutes Cited:

23 U.S.C. § 130 .....i, 5, 7, 9, 18, 21

23 U.S.C. § 144 .....i, 1, 5, 7, 9, 18, 21

23 U.S.C. § 152 .....i, 2, 5, 7, 9, 18, 21

23 U.S.C. § 409 ..... *passim*

Public Law 104-59 5

Other Authority Cited:

Webster's Ninth Collegiate Dictionary 14

Contents

Page

APPENDIX

Appendix A— Excerpted Transcript Dated July 29, 1993 ..... 1a

Appendix B — Motion In Limine Filed June 4, 1993 ... 15a

Appendix C — Judgment of the 22nd Judicial District Court, State of Louisiana Dated May 13, 1993 ..... 21a

FACTUAL PROCEDURAL OVERVIEW

During a rainstorm on February 2, 1992, the vehicle operated by Herbert Champagne lost control crossing a grid located on Louisiana Highway 11 bridge, crashing head on into the vehicle operated by Paul Doucet, in which his two sons, Russell and Michael were passengers. Moments before impact, Paul Doucet threw himself in front of his two sons, attempting to protect them from injury. As a result of that action, the impact hit him full on in the face, causing severe lacerations to his face, including his lips and tongue, nose and scalp and causing mild brain damage, leaving him with substantial cognitive deficits. Despite his efforts, both of his sons received even more severe injuries, Russell Doucet, 20 years old at the time, suffering such a severe spinal fracture that he was rendered paraplegic and will remain so the rest of his life; Michael Doucet, only 17 at the time, suffered a spinal fracture, which has rendered him disabled.

The grid on the bridge at which the accident occurred had been the occasion of numerous other collisions, with numerous parties, who deal on a daily basis with accidents on the bridge, namely the state troopers who report said accidents and the bridge tenders who observe said accidents, even single car accidents when it is wet, consider the grid to be very unsafe for use in wet weather conditions.

At the initial hearing on the motion *in limine,* and to compel production of documents, the trial court correctly maintained that 23 U.S.C. § 409 exclusion for information obviously generated under 23 U.S.C. § 144. Although the court initially indicated it would rule on other documentation, it recalled that order and referred it to the trial of the matter. At the trial of the matter, after hearing substantial evidence, the court ruled that it was excluding all documentation as being excluded under 23 U.S.C. § 409.

An appeal was taken from a trial judgment absolving DOTD from any negligence in its maintenance operation of the bridge and grid in question; the First Circuit Court of Appeal reversed the trial court's findings on liability, admitting individual police reports, work sheets prepared from said police reports when not prepared by DOTD personnel, other independent records and other records referred to in an earlier 1990 unpublished decision in which the bridge was found defective and a cause-in-fact, of an accident causing that head-on collision remarkably similar to the one at bar. Application was made to the Louisiana Supreme Court for a writ of certiorari and it is to be noted that said application did not refer to any programs conducted under 23 U.S.C. § 152 which would give rise to a privilege under 23 U.S.C. § 409; neither did that writ or any prior proceedings in the state courts consider the 1995 amendment, enacted after the final state court judgment.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE OF THE PRIVILEGE OF SECTION 23 U.S.C. § 409 AS IT APPLIES TO "REPORTS, SURVEYS, SCHEDULES, LISTS OR DATA" COMPILED PURSUANT TO 23 U.S.C. § 152 WAS NEVER RAISED AT THE STATE COURT LEVEL NOR IN THE APPELLATE COURTS NOR IN THE APPLICATION TO THE STATE SUPREME COURT.

It is a long standing principle of law that issues not raised in the state court level shall not be reviewed by this Court. In *Hamilton Co. v. State of Massachusetts*, 73 U.S. 632, 6 Wall. 632, 18 L. Ed. 904, U.S.Mass. 1867 it was stated:

> Questions not decided in the state court, because not raised and presented by the complaining party, will not be re-examined in this court, on a writ of error sued out under the 25th section of the judiciary act . . . Clear and necessary intendment that the question was raised and must have been decided as claimed, in order to have induced the judgment, is sufficient, but *it is not sufficient to show that such a question might have arisen and been applicable to the case,* unless it appears in the record that it did arise and was applied by the state court in disposing of the controversy. (At page 906) (Emphasis added).

And followed in *Walker v. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678, U.S. La. 1875; and *Hormel v. Helvering,* 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037, *cert. granted,* 61 S. Ct. 35, 311 U.S. 626, 85 L. Ed. 397.

In pre-trial motions, respondents moved to compel the discovery of various documents in response to which the state requested a protective order and an order *in limine* alleging that said information requested was excluded from discovery and/or admissibility as a result of the application of 23 U.S.C. § 409. In that motion, the State moved to limit or restrict testimony and evidence in the following particulars:

> 1. The use of reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident site, hazardous roadway conditions, or railway-highway crossings, pursuant to

> Sections 130, 144, 152 of title U.S. Code Annotated Section 409 is prohibited either as evidence or for being considered for other purposes and any action for damages filed in state or federal court.
>
> 2. All Section 144 Highway safety data is attached hereto as Exhibit A.
>
> 3. All Section 144 Bridge Documentation is attached hereto as Exhibit B.
>
> (Extracted from DOTD Motion In Limine, *see* Respondents' Appendix A, 15a).

In the testimony of Donald Ray Marson, an employee of DOTD (annexed as Petitioner's Appendix F hereinafter " Pet. App.", pages 46a *et seq.* of petitioner's application), there is a long discussion as to the identity of the evidence consisting of records and documents being offered and under whether or not said records and/or documents were subject to the exclusion of 23 U.S.C. § 409. The record is absent of any showing of any specific program. Rather, Marson's testimony is conclusionary when he indicates that all of the documents identified were produced as a result of federal funding; Marson testified that the DOTD gets "our accident data from the Department of Public Safety" (Pet App. 47a); and further on where he admits that the data in question could have "been produced for a state route that is not federally funded" (Pet App. 52a).

It is that refusal of the trial court to consider the individual documents in question and its order of a blanket exclusion, finding that § 409 applied to the case, rather than that § 409 applied to any specific documents, the identity of which documents the court did not consider, was its error. More

importantly, however, it demonstrates that there was never any showing by the DOTD of any documents produced pursuant to a safety enhancement program under 23 U.S.C. §§ 130, 144 and 152.[1]

II.

THE 1995 AMENDMENT OF 23 U.S.C. § 409, ADDING THE WORDS "OR COLLECTED" AFTER THE WORD "COMPILED", DOES NOT PRESENT ANY CHANGE IN THE LAW AND IS NOT PROPERLY BEFORE THIS COURT AS THE AMENDMENT WAS NEVER RAISED AT THE STATE COURT LEVEL; FURTHER, THAT THE AMENDMENT WOULD NOT HAVE AFFECTED THE ADMISSIBILITY OF ANY OF THE EVIDENCE PRESENTED TO THE LOWER COURTS; IN THE ALTERNATIVE, ANY SUCH CHANGE WOULD BE SUBSTANTIVE BECAUSE IT WOULD DEPRIVE PETITIONER OF STATE TORT RIGHTS.

The 1995 amendment contained in Public Law 104-59 was enacted November 28, 1995, some 25 days after the final state court action, the denial of the writ by the Louisiana Supreme Court (*see* Pet. App. 20a). As such, the issue of the construction of that amendment which adds the words "or collected" after the word "compiled" in the statute, was never raised or pled in any of the lower state courts including in the application for writ of certiorari to the Louisiana Supreme Court. Accordingly under *Hamilton Co. v. State of Massachusetts, op. cit.*, "questions not decided in the state court because not raised and presented by the

---

1. 23 U.S.C. §§ 130, 144 and 152 refers to specific programs designed respectively for railroad crossings § 130, bridge maintenance and study § 144, and safety enhancement programs § 152. For the text of §§ 152 and 409, *see* Pet. App . 38a *et seq.* Since §§ 144 and 130 are not part of the questions presented for review to this Court, they are not reproduced herein.

complaining party, will not be reexamined in this court . . ." (at page 906). On those two issues, the construction and application of 23 U.S.C. § 409, as amended by the 1995 amendment, is not properly before this Court.

However, if the 1995 amendment should be before this Court it would be noted that it would affect no change in the law (DOTD's application, page 28). In construing this statute which decision was followed by the Court of Appeals, the Louisiana Supreme Court in *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993) stated the following:

> DOTD essentially asks this Court to transform a statute, which by its literal wording protects information *compiled* for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one document or composed from other sources. [*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. Moreover, privileges derogate from the system by which courts determine the truth and should not be expansively construed. *United States v. Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108 41 L.Ed.2d 1039, 1065 (1974). Section 409 creates a privilege for compilations enumerated in the statute, but *the privilege does not extend to reports and data gathered for or incorporated into such compilations.* (At page 173) (Emphasis added).

It is therefore clear to this Court whether the statute reads "compiled" or "compiled or collected" or "gathered for or incorporated into such compilations" as used by the *Wiedeman* court, that the compilations and the collections and the gatherings all in fact refer to an end product, more particularly, an end product envisioned to be compiled, collected or gathered pursuant to a program under 23 §§ 130, 144 or 152.

If the DOTD's contention is that the addition of "or collected" enlarges the amounts of said reports, schedules, surveys, lists or data, which would be excludable under 23 U.S.C. § 409, then this would be a substantive change moving beyond the realm of mere procedural rules of evidence and into a substantive field which should not be applied retroactively because it would reinstate a form of sovereign immunity, for the purpose of state highway department defense.

III.

THE DECISION OF THE STATE COURT OF APPEALS IS CORRECT IN ITS INTERPRETATION OF 23 U.S.C. § 409, AND ITS ADMISSION OF EVIDENCE INCLUDING POLICE REPORTS AND OTHER DOCUMENTS NOT COMPILED BY THE DOTD.

The decision of the State Court of Appeals is correct in its interpretation of 23 U.S.C. § 409 and its application of that statute to the facts at bar and its reversal of the Trial Court's ruling on liability. Adopting the view of *Southern Pacific Transport v. Yarnell*, 890 P.2d 611 (Ariz. 1995), *writ refused*, __ U.S. __, 116 S. Ct. 352, respondents suggest that a reading of § 409 must be an "integrated" one, reading § 409 along with the other pertinent parts of the statute to which it refers in its body. To extend it beyond the sections and programs, for which it was designed to provide protection, is to expand the privilege created

by the statute, denying all evidence alleged to be subject of the exclusion of 23 U.S.C. § 409, without an examination of the origin of that evidence.

The state Court of Appeals is correct in allowing into evidence police accident reports prepared by police departments and stored by the Department of Public Safety, the DOPS not the DOTD.

Most recently, the Arizona Supreme Court, in *Southern Pacific Transp. Co. v. Yarnell, op. cit.*, writ refused 116 S. Ct. 352, concluded after its analysis of the statute:

> It can thus be seen that each of the categories of information described in 23 U.S.C. § 409 has its origin in the programs described in 23 U.S.C. §§ 130, 144 and 152. These are words of art. This is powerful support for the proposition that the documents exempt from discovery and excluded from evidence under Section § 409 are precisely the documents described and *prepared under the authority of §§ 130, 144 and 152 and no others.* This would promote the integrity of the Federal Regulatory Scheme without compromising the integrity of the parallel state tort system. (At pages 614-615) (Emphasis added).

IIIA.

THE STATUTORY PRIVILEGE CREATED BY 23 U.S.C. § 409 SHOULD BE READ AS INTEGRATED WITH THE OTHER SECTIONS OF THAT TITLE AND THE PROGRAMS ARISING UNDER SUCH SECTIONS, NAMELY §§ 130, 144 AND 152.

It is to be noted in considering 23 U.S.C. § 409, that there are no "reports, surveys, schedules, lists or data" which are compiled under that section of the statute. Rather that section establishes a statutory privilege which excludes said reports, *et al.*, from discovery when they are:

> 1. reports, surveys, schedules, lists or data
>
> 2 compiled for the purpose of
>
> > a. identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossing, pursuant to sections 130, 144, and 152 of [Title 23] or
> >
> > b. developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Under such an analysis, it is clearly demonstrated that the DOTD offered no evidence whatsoever as to what safety enhancement program they were utilizing said information for; consequently in the absence of such a showing, evidence not prepared nor collected is not subject to the exclusion.

It is the oft expressed principle that the "public . . . has a right to every man's evidence except for those persons protected by a constitutional common law or statutory privilege," *United States v. Nixon,* 413 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). Further stating, "that privileges, whether established in the Constitution, by statute, or at common law", are "neither lightly created nor expansively construed, for they are in derogation of the search for truth". (*Id.* at 710, 94 S. Ct. at 3108).

The United States District Court in *Kitts v. Norfolk and Western Railway Co.*, 152 F.R.D. 78 (S.D.W. Va. 1993), construed 23 U.S.C. § 409 stating:

> The statute does after all, contemplate protection for documents and data prepared or "compiled for the purpose" (emphasis added) of safety enhancement. It clearly *does not accord protection for documents or data prepared or compiled for some entirely separate or distinct purpose,* even if the contents of the same, are parts thereof eventually become ingredients thrown into a soup kettle with the distinct flavor of safety enhancement. (At page 81).

The DOTD's interpretation would afford protection for documents prepared for entirely distinct purposes, *i.e.,* police accident reports.

IIIB.

THE DOTD INTERPRETATION WOULD BAR CONSIDERATION OF EVIDENCE, NOT COMPILED OR COLLECTED UNDER ANY APPLICABLE STATUTORY PROVISION, PREVENTING CONSIDERATION BY THE COURT OF ADMISSIBLE EVIDENCE.

In its application herein the DOTD is requesting this Court rule as excluded from admissibility under the provisions of 23 U.S. § 409, various police accident reports forwarded to the Louisiana Department of Public Safety. Additionally, the DOTD asks that this Court extend that exclusion to the information contained in the police reports and to the review of that information by experts including experts for both the respondents and the petitioner, DOTD.

Under the decision by the Louisiana Supreme Court in *Weideman v. Dixie Elec. Membership Corp., op. cit.*, that court construed the statute and its applicability and concluded:

> Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations. (At page 173).

The court then went on to allow as discoverable and admissible police accident reports and other raw data and at the same time, denied admissibility to surveys, applications for studies assisting, assigning priorities and projects and other compilations made for developing highway safety construction projects.

Following the decision in *Wiedeman*, the First Circuit allowed the following evidence:

> In conducting our review of the record, we considered the expert testimony as well as the improperly excluded evidence. The *individual accident reports* from 1982 to 1989 indicate that of the accidents occurring on the metal grate, *over 75%* occurred in wet weather (footnote 4). This high incidence of wet weather accidents supports the theories offered by the Doucet experts rather than the DOTD experts. (First Circuit Court Slip Opinion, Pet. App., 7a) (Emphasis added).

The same rule would allow the admissibility of various bridge tender reports. The First Circuit stated:

> Another essential document excluded by the trial judge, was a May 13, 1986 *letter from bridge tender* Alex Kinchen. This letter was contained in the excluded damage reports and complaint records. In the handwritten letter, Kinchen states "*Evertime [sic] it raines [sic] someone is spinning around on the bridge* northbound usually they keep going." This letter supports the Doucets' contention that the number of wet weather accidents on the grate is even higher than the number indicated in the individual accident reports. (First Circuit Court Slip Opinion, Pet. App. at 7a) (Emphasis added).

That quote also allowed in an inventory showing the erosion of the projectile points:

> A third document, also contained in the excluded damage reports and complain records, is a May 11, 1992 inventory of steel grate compiled by Dennis Burke, a DOTD district bridge maintenance engineer. The inventory reflects the various types of unused steel grate available in Burke's district. On May 4, 1992, Burke made the *following notation on the inventory sheet, "this is the pattern [of metal grate]* on N & S draw @ US 11. FAPP *[for all practical purposes] projections are gone"*. The note refers to the 5/16 inch projections which protrude slightly above the plane of the metal sheet. The notation clearly supports the contention of the Doucet experts who stated that the metal grate on the Highway 11 bridge was worn smooth. On the other hand, the note directly contradicts statements made by the DOTD experts. One DOTD expert stated that the "traction lugs" still existed on the grate. Although a second expert stated that there was some "polishing" of the grid, he later suggested that the projection points never existed and, therefore, could not be missing. By admission of DOTD's own maintenance engineer, the projection points had existed but were worn smooth. (First Circuit Slip Opinion, Pet. App. 7a-8a) (Emphasis added).

The DOTD's contention is that all of the facts referred to by the First Circuit hereinabove, improperly excluded by the trial

court, are included within the meaning of "reports, surveys, schedules, lists or data" which would be protected under 23 U.S.C. § 409. That same First Circuit speaking some years earlier indicated "this enumeration suggests something more than simple factual information that [a state department of transportation] has gathered", *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435, 439 (La. App. 1 Cir. 1988).

The Arizona Supreme Court in *Southern Pacific Transp. Co. v. Yarnell, op. cit.* concluded that the words "reports, surveys, schedules, lists or data" are terms of art which refer to more than raw facts. Those courts rejected the argument that the word "data" would encompass such facts finding that not even the word data is strictly synonymous with "fact."[2]

---

2. *Yarnell* Opposition Brief at page 11:

> *Webster's Ninth Collegiate Dictionary* defines the terms as follows:
>
> > **data**: factual information (as measurements or statistics) used as a basis for reasoning, discussion or calculation, the [data] is plentiful and easily available - H.A. Gleason, Jr.> <comprehensive [data] on economic growth has been published - N.H. Jacoby>
> >
> > **fact**: a thing done: as a: CRIME <accessory after the [fact]> b *obs*: FEAT c *archaic*: ACTION 2 *archaic*: PERFORMANCE, DOING 3: the quality of being actual: ACTUALITY <a question of [fact] hinges on evidence> 4 a: something that has actual existence <space travel is now a [fact]> b: an actual occurrence: EVENT <prove the [fact] of damage> 5: a piece of information presented as having objective reality - in fact: in truth: ACTUALLY

More persuasive is the use of the phrase "reports, surveys, schedules, lists or data" in the statute itself. The modification of said compilations or collections of data is for work performed pursuant to specific sections, and the work product generated out of those sections. As such, they become terms of art as used in § 409. For that reason, it must be demonstrated that such a report and/or data is gathered pursuant to such a section and the absence of which the privilege should be limited.

Regarding the retrospective effect of the 1995 amendment, petitioner cites the case of *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 711, 94 S. Ct. 2006, 2016, 40 L. Ed. 2d 476, 488 (1974) for the proposition that a change in federal procedural law applies retroactively, absent contrary legislative mandate or manifest injustice. The case at bar, as did *Bradley,* presents a unique consideration of what effect is given to a change in law which takes place once a ruling has been made and while a case is on direct review. A reading of *Bradley* indicates that the philosophical underpinnings of that decision is the Supreme Court holding in 1801 by Chief Justice Marshall in *United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801). In *Schooner Peggy,* the court noted that, if "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs", the new law must be obeyed, *id.* at 110; but the court qualified that obligation recognizing that, "it is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.." *Id.* at 110.

It is to be noted that the *Bradley* rule has by and large been applied in instances which involve incidental actions, in *Bradley* an action for attorneys fees in a desegregation case prior to the federal enactment of the authority to award such attorneys fees. The cases which followed *Bradley* have dealt with sexual

harassment[3], environmental issues[4], and other civil rights claims.[5]

Much more apropos is the Supreme Court rulings based on *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) which stated, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" (at page 208, at page 471, at page 493). In *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992), the court goes into an extensive history of the development of the Civil Rights Act and more particularly inquiry into congressional intent, legislative history, and judicial history. Therein it was noted:

> Finally, the *Bradley* court implied that such manifest injustice would occur with a retrospective application would impose "new and unanticipated obligations . . . without notice or an opportunity to be heard". (416 U.S. at 720, 94 S.Ct. at 2021.)

This Court also cites Justice Scalia writing in the *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) wherein the court wrote, "[d]uring . . . more than 150 years of doctrinal certainty," the Supreme Court denied retroactive application to new statutory law except when "the statute affirmatively so required" citing *Kaiser* at 844, quoted in *Gersman* at 896, further stating:

---

3. *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

4. *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 210 (1975).

5. *Fox v. Parker*, 626 F.2d 351 (1980).

> *Schooner Peggy* stands for the proposition that only when congress *"plainly says"* that a legislation has retroactive effect are courts to depart from "the ordinary presumption which courts will 'struggle hard' to apply" against retroactivity, *Id.* at 846-847, 110 S.Ct. at 1582 (emphasis in original). (*Gersman* at 896).

The court also quotes its approval of the following from *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992):

> The measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead we focus on the practical effects the amendments have upon the settled expectations of the parties. *Id.*, 968 F.2d at 433 cited from *Gersman* at page 900.

Although the presumption would have "granted retroactivity", it was pointed out that even if it did its own built in exception for "manifest injustice" would lead to prospective application of the amendment.

It is respectfully submitted that the *Bradley* rule is misstated when the built in exceptions contained therein concerning manifest injustice are not considered. More particularly, the focus on the practical effect the amendments have upon the settled expectations of the parties is the deciding factor. For those reasons the amendment before this Court should not be applied to the case at bar, a final state court judgment when the amendment is enacted.

IIIC.

THE EVIDENCE SOUGHT TO BE EXCLUDED WAS PREPARED BY STATE EXPERTS AND NOT USED FOR ANY PURPOSE PURSUANT TO 23 U.S.C. §§ 130, 144 AND/OR 152.

It has been demonstrated in this Court that the police reports in question were not prepared in any way by any state highway employee, but by police agencies in the area. It has also become clear that said police reports were not collected by the DOTD, but by the Department of Public Safety, which then made said compilations available to various parties requesting same. The DOTD, however, argues in its brief, at page 12, that the statute as it is written "excludes all data, not just compiled data".

From those police accident reports, Jim Clary on behalf of respondents, and Jack Humphries and Larry Peterson on behalf of petitioners, each compiled an analysis of said accident reports with both sides concluding that a review of such accident reports indicated a highly dangerous 75% increase in the incidents of accidents in wet conditions rather than dry conditions (Court of Appeals Decision, Pet. App. 7a). The First Circuit Court of Appeal allowed it into evidence stating "because the spreadsheet was prepared using individual accident reports, it was not compiled under Section 409, the spreadsheet should have been included in evidence, *Doucet vs Champagne and DOTD.*" (Pet. App. 6a at footnote 3).

IIID.

THE CUMULATIVE EFFECT OF THE EVIDENCE, INCLUDING POLICE REPORTS, BRIDGE TENDER COMPLAINTS, INDEPENDENT OBSERVATIONS BY EXPERTS, ADDUCED AT TRIAL AS WELL AS OTHER ADMISSIBLE EVIDENCE CONFIRMS THE COURT'S RULING.

As the result of the "blanket" exclusion of any and all material asserted to be privileged under 23 U.S.C. § 409 by the trial court, that court did not consider the incidence of wet accidents versus dry accidents so demonstrated by a spreadsheet prepared by independent experts, and derived by an analysis of the accidents by experts for both sides. That incidence highlights the effect of the various conditions which were found to exist on this bridge as a result of misuse and lack of maintenance and wear and tear over the bridge life, which the DOTD did not deny but which they asserted was not a factor in this accident, a conclusion belied by the aforementioned incidence of wet to dry accidents. Those deficiencies included the following:

1. A total lack of maintenance on the bridge since anyone at the DOTD can remember, including the head of the department, an employee of more than 20 years (*see* testimony of District O-2 administrator, Resp. App. A, 13a; further is Robert Roth, maintenance manager, Resp. App. 3a, 4a, 6a);

2. The First Circuit's confirmation that the police officer investigating the accident was of the opinion that the grid surface itself was the cause of the accident, quoting the officer "(at) the time of the accident the roadway was wet, which made the grid itself very slippery, which I think that a major factor in the accident itself" (First Circuit Court Decision, Pet. App. 10a);

3. Skid testing over a five year period with traction measurements equivalent to those for ice and snow (*see* testimony of Chris Shapley, DOTD expert, Resp. App. 11a and Frank Griffith, Resp. App. 2a);

4. Substantial rutting and pooling of water in the asphalt roadway (*see* testimony of James Clary, Resp. App. 8a);

5. Surface discontinuities approaching the grid surface of the bridge, including many different co-efficients of friction resulting from the rutting asphalt, pooling water, smooth/solid metal surface, asphalt filled grid surface which held water, rutting of the grid roadway itself, and wearing down of projectile points all of which effected the co-efficient of friction and therefore traction and the steering ability of the drivers on such roadway (*see* testimony of James Clary, Resp. App. 9a); and,

6. Failing to replace the bridge grid surface (*see* testimony of James Clary, Resp. App. 9a, 10a).

All of which deficiencies contribute to inadequate steering conditions on the grid surface.

All of those same deficiencies were found to have existed in the case of *Cousins v. Berteaut*, 22nd JDC case number 89-2066 (Pet. App. 71a, *et seq.*). Judge Fitzsimmons found those items enumerated above to have existed in 1986 and that the deficiencies mentioned hereinabove were responsible for the lack of adequate steering conditions on the bridge. The trial judge therein stated:

> All of these minor factors are small when they are viewed in isolation. When viewed

> together, *each functions like a piece of mosaic, to ultimately form* a complete picture. All point to and emphasize a common centerpiece: namely, these factors create *a wet weather hazardous condition on the bridge which was known to the State of Louisiana*, and which could have been corrected any time since 1985. (Pet. App. 71a, *et seq.*) (Emphasis added).

It is therefore respectfully submitted that the First Circuit Court of Appeals decision herein is correct both in its interpretation of 23 U.S.C. § 409, its consideration of documents incorrectly excluded by the trial court, the evidence of the abject refusal by the DOTD to make any effort to comply with any safety standards or even its own maintenance standards regarding this bridge and the confirmation of dangerous existence by the incidence of the 75 to 25 ratio of wet to dry accidents.

CONCLUSION

If the 1995 amendment is not before this Court as it is suggested earlier, then this writ application is a duplicate of that submitted in *Southern Pacific Transp. Co. v. Yarnell* which writ application was denied (116 S. Ct. 352 on October 16, 1995). If Congress had intended by that amendment to exclude from evidence police reports, observations of independent witnesses and the analysis of experts, it could have spoken to that. As recently as November 28, 1995 it did not. Truly the privilege, accorded under 23 U.S.C. § 409 is limited to "reports, surveys, schedules, lists or data", developed pursuant to specific highway safety enhancement programs, specified in 23 U.S.C. §§ 130, 144 and 152.

Without a clear statement from the Congress, that privilege should not be extended beyond an integrated reading of 23 U.S.C. § 409. Traditional records and evidence including police reports of accidents, observations of independent witnesses, and independent analysis of experts are not now subject to the exclusionary rule. Moreover, the record is replete with examples of defective conditions allowed to exist without any showing of any maintenance efforts being made by the DOTD. That the amendment should not be granted any retroactive effect is clear when considered upon the facts of this case and upon the settled expectations of party at the time it was tried.

While the incidence of accidents, revealed by the analysis of police reports, demonstrates a highly dangerous condition according to every highway standard both nationally and the DOTD's own standard, the incidence of accidents merely confirms the defective condition which would was demonstrated to have existed at the time of this accident.

It is respectfully submitted that the writ be denied.

Respectfully submitted,

DOUGLAS MICHAEL SCHMIDT
Counsel of Record
WAYNE E. GARRETT
Of Counsel
LAW OFFICES OF
DOUG SCHMIDT, APLC
Attorneys for Respondents
335 City Park Avenue
New Orleans, Louisiana 70119
(504) 482-5711

APPENDIX A — EXCERPTED TRANSCRIPT DATED JULY 29, 1993

TWENTY-SECOND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

NO. 92-11043-1

PAUL DOUCET, ET AL

VERSUS

HERBERT J. CHAMPAGNE, JR.

VOL. I

TRANSCRIPT OF PROCEEDINGS taken before the Honorable A. Clayton James, Judge Presiding, Division E, Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana, on July 29, 1993, Covington, Louisiana.

APPEARANCES:

DOUGLAS M. SCHMIDT, ESQUIRE,
PETER R. BORSTELL, ESQUIRE AND
WAYNE E. GARRETT, ESQUIRE
ATTORNEYS FOR PLAINTIFFS

MS. NANCY YEAGER
ATTORNEY FOR MR. CHAMPAGNE

Appendix A

STEPHEN J. CAIRE, ESQUIRE AND
T. GORDON SANDERS, ESQUIRE
ATTORNEYS FOR DOTD

REPORTED BY:

DEBBIE M. MURRAY, C.S.R.
OFFICIAL COURT REPORTER

* * *

[554] numbers of .33 on the grid, so this is well within the comfortable measurements that we have here. Tracked snow .37, .35, .32. That is untracked snow. Tracked snow is .37, .31, .36, and so on.

The point of this is that regardless of what highway engineers say, what state governments say, what anybody says, that here is credible evidence that we have a bridge with traction very close to that of snow. And that is, as I indicated in the AASHTO material, it's up to the public to decide and the courts to decide whether or not we want people driving on packed snow.

MR. CAIRE:

Your Honor, I'm not objecting. May I ask him to give me the name of that?

THE WITNESS:

Yes, sir. It's around the courtroom it is in a book that we have. This is an article by — pardon, this page is cut off. The title is, Reconstructing Collisions Involving Ice and Slippery

Surfaces, the S.A.E. number is 930896. It's on page 185 of the book. That is — yes, that book. I think that is the same.

MR . CAIRE:

Page what?

THE WITNESS:

On 185. There is only, I think along these lines one other thing that will help us understand what is going on there. And I have a document that was supplied evidently by Mr. Blaschke in the Cousins case. I haven't seen

* * *

[631] Which is a Louisiana Department of Transportation and Development bridge maintenance section generated inspection schedule which contains references to the —

MR. SANDERS:

The actual bridge inspections.

MR. GARRETT:

The actual bridge, well, it contains a reference to when the bridge is scheduled by them to be inspected and when it was last inspected.

THE COURT:

Let it come into the record in the form of a proffer, not as evidence.

MR. GARRETT:

Okay. And again there are more of these than just one, Your Honor. I offer them all in globo.

EXAMINATION BY MR. SCHMIDT:

Q. During your twenty-two years with the Department of Transportation do you recall whether the steel grid was ever replaced on the Highway 11 Bridge?

A. I do not recall it ever having been replaced.

Q. How old is that grid?

A. I don't know.

Q. Can you give me an estimate as you did in your deposition?

A. No, I don't recall estimating the age of the grid in my deposition. What I think I said was it is unlikely that that was the original grid, given that the bridge is as old as it is.

Q. Are there still transverse bars missing from the grid floor?

[632] A. Yes.

Q. Since the Bush case have any been replaced?

A. Not to my knowledge.

Appendix A

Q. Has anything been done on the bridge to increase the coefficient of friction?

MR. SANDERS:

Your Honor, I am going to object to that question, without a foundation being laid.

THE COURT:

Overrule the objection. I think this man can answer that.

THE WITNESS:

No.

EXAMINATION BY MR. SCHMIDT:

Q. Have they replaced the projection points that were on the bridge at one time?

MR. SANDERS:

Objection. Assumes facts not in evidence.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know if that was —

THE COURT:

Overruled.

Appendix A

THE WITNESS:

What do you mean by projection points? I am —

EXAMINATION BY MR. SCIIMIDT:

Q. They have little bars that are stuck up between the grids to increase the coefficient of friction. Are you not aware that was on the original grid?

A. No, I am not aware of that.

Q. Have they done anything since that to increase the width of the shoulders on the bridge since the Bush case?

A. No.

* * *

[637] closing of the grid at all?

A. Yes. You actually got two trunnions, but the main trunnion is the hinge on which the movable leaf is supported which allows it to open like a door.

Q. And they would cause that — is that what comes in when it locks together?

A. No, no. The trunnion is the — if the bridge leaf — if the bridge moves like a door. (Indicating.) It has that hinge. The trunnion is the pin on the hinge.

Q. So that has nothing to do with the sheets meeting together?

A. Nothing whatsoever. There is also a counterweight trunnion. I don't know which trunnion you're talking about but —

Q. That is all right. That is sufficient. Thank you. When was the last time they resurfaced the Highway 11 Bridge, the DOTD? Do you remember what you told us in your deposition?

A. I don't remember. I think I looked it up at the time of the deposition. It is — I don't know. If I looked it up at the time of the deposition that is the correct date, but I don't recall at this time.

Q. Was it more than Fifteen years ago?

MR. SANDERS:

Your Honor, I will object. He said he doesn't know and if it is in his deposition I mean he —

THE COURT:

I sustain the objection.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know if it has been done more than once since you have been with DOTD?

* * *

Appendix A

[646] MR. SCHMIDT:

D-10.

EXAMINATION BY MR. SCHMIDT:

Q. Would you describe what these show to you?

A. These are pictures taken near the North and South Drawbridge and it shows the condition of the road leading to the drawbridge. It shows the condition of some of the joints in the roadway on the vents leading to the two drawbridges. It shows standing water on the road It shows a considerable amount of handrail damage. This one shows the leg of a passenger I had in the car. This one shows a foot. This one shows some of the guardrail that has been damaged. Some of it is missing and again you can see the joints leading to the steel grid floor. Another one just about the same thing and this is —

Q. That is damage onto the railings?

A. This is damage to the guardrail. It shows the type of temporary repairs that were made. This is at the draw showing some pavement repair and just the condition of the pavement and the joints and it also allows broken handrails.

Q. You said repaired — was it even when you got to see it or was it —

A. You can see that there are some surface irregularities in the paving. This one just shows water standing in the ruts and also along the gutter you can see the scuffers along the curb. Those are little black spots and they are pretty well inoperative.

Appendix A

Q. My next question was what did you observe regarding Highway 11, but have you gone over that with the pictures pretty much or is there something you wanted to add?

A. No, sir. I observed at the — I don't have a picture of the grids in there because pictures that were already

* * *

[662] me that you get quite a bit of water beneath the asphalt and you are pumping out patches. The — I saw some patches that look fairly fresh on the bridge and a lot of them are coming up.

Q. Would those patches be noticeable to a driver?

A. When you run over them you notice them, yes.

Q. Would they be obvious to a driver?

A. If you are looking for them. I hate to say would it be obvious to someone else, because I am out there looking for them. I see them readily.

Q. Is there a remedy for this?

A. The remedy for it would be better maintenance or this asphalt is what from '77 to '93? It is what, sixteen years old. It is pretty old asphalt.

Q. What have you observed about the steel grid at the North Draw?

A. The steel grid at the North Draw has some transverse

bars missing. It — when you go from joint to joint or from vent to vent the longitudinals don't lineup and where the wheels have passed you have the two inch bars, which are four inches apart. And these two inch bars have the tops worn off where the, it becomes smooth. As I recall from the standard the serrations are about an eighth of an inch deep. Most of those are gone. So you have little semicircular pieces of metal that if you, they are six inches apart and if you get your wheel in there it will tend to make you track. When you get to the next joint and it's not lined up then you are going to seek a track until it tracks again. That is what, I think, gives you the uneasy feeling of your car moving side to side.

Q. As an expert in the highway design, safety and engineering what is your opinion as to the steel grid on [663] the North Draw?

A. I think it is worn out.

Q. Does it need replacement?

A. I think so.

Q. Have you, what would be the cost? Have you checked into the cost of replacement or can you estimate the cost of replacement?

A. Yes, sir.

Q. What would that be?

A. I contacted some people in bridge, the bridge business and I was given an estimate of —

MR. SANDERS:

Your Honor, I am going to object to any hearsay testimony about what someone else may have told him.

THE COURT:

Well, I think this is the type information that experts would normally gather and rely upon and I think that is an exception to the hearsay rule and I will let it in. Overruled. You may answer.

THE WITNESS:

I was given a figure of $32.00 a square foot to, for new grating. If you were putting on new grating on a bare beam. I was given a price of between $5.00 and $50.00 a square foot to remove and replace and this came from two bridge contractors and I compared it with the deposition of one of the State's bridge design engineers. He estimates $50.00 a square foot.

EXAMINATION BY MR. SCHMIDT:

Q. Do you know how many square foot the bridge is

* * *

[747] A. I wasn't measuring the skid numbers. I was measuring the —

Q. I am asking the question.

A. The number is what it is.

Q. Right. Is the skid number on here 33.1?

A. That is what the number says.

Q. Is it 33.1 skid number slick? Is it like ice?

A. Oh, it's not like ice, no.

Q. Is it like crushed snow or impacted snow if the ice stays on it?

A. What tires are you going to use? It makes a — I mean snow tires do quite well. You might get up to .33 with snow tires or chains.

Q. Was there snow tires or chains in this accident?

A. The snow — there is no snow or ice in this accident. So I don't see the point.

Q. Did you — were you here when Mr. Roth testified?

A. I think so.

Q. Were you here?

A. He is that gentleman over there, yes.

Q. Were you here when he said, I asked about the article and he said the grid work on draw bridge is too light. The heavy winds are causing it to rise a few inches?

A. I thought that was funny, yes.

Q. Why did you think that was funny?

A. Do you want me to show you?

Q. No. I just want to ask what you think

A. The idea.

Q. What is so funny about it?

A. Because the guy that said that, all right, obviously is not an engineer or physicist. When you calculate the pressure differential due to flow blockage under a bridge

* * *

[778] A. I am not aware of any grid replacement. Is that what you're talking about the grid?

Q. Yes, sir.

A. We are talking about the steel deck on the movable span.

Q. Yes, sir.

A. No, I am not aware of having replaced the steel grid.

Q. Did you repair any of the missing parts in the steel grid?

A. There may have been, but I wouldn't be aware of it. They would be handled by our district maintenance engineer.

Q. So you would go by his testimony on as far as that?

A. He is in charge of all district maintenance and more familiar with the maintenance activities than I.

Q. Did you do anything to increase the coefficient of friction on the bridge? Did you lay new asphalt? Was new asphalt laid on the bridge or anything?

MR. SANDERS:

Your Honor, I am going to object to the form of that question. He asked about three parts to it. I don t know which one.

THE COURT:

I overrule the objection. I didn't hear three parts. You may answer.

THE WITNESS:

What specifically are you?

EXAMINATION BY MR. SCHMIDT:

Q. The previous overlay. Did they take up all the old asphalt and redo the bridge?

A. To my knowledge we have had no overlay projects on the bridge.

Q. How long has that been since? Okay, before I ask

* * *

APPENDIX B — MOTION IN LIMINE FILED JUNE 4, 1993

NO: 92-11043 DIV "E"

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

PAUL DOUCET, ET AL

VERSUS

HERBERT CHAMPAGNE, JR., ET AL

FILED: _____ _____

DEPUTY CLERK

MOTION IN LIMINE

NOW INTO COURT, through undersigned counsel, comes the Louisiana Department of Transportation and Development, and moves this Honorable Court to limit or restrict testimony and evidence proposed to be offered by or on behalf of plaintiffs in the following particulars:

1. The use of reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident site, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144, 152 of title 23 U.S. Code Annotated Section 409 is

prohibited either as evidence or for being considered for other purposes and any action for damages filed in state or federal court.

2. All Section 144 Highway safety data attached hereto as Exhibit A.

3. All Section 144 Bridge Documentation attached hereto as Exhibit B.

WHEREFORE, movers pray that plaintiff be ordered to show cause why the foregoing Motion in Limine should not be granted and after due proceedings, said motion be granted.

Respectfully submitted,

RICHARD P. IEYOUB
ATTORNEY GENERAL

STEPHEN J. CAIRE
SPECIAL ASSISTANT ATTORNEY GENERAL
REED & CAIRE
ATTORNEYS AT LAW
71206 HENDRY AVENUE
COVINGTON, LA 70433
(504) 892-9295

BY: s/ T. Gordon Sanders
T. GORDO SANDERS
ATTORNEY

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all opposing counsel, by placing a copy of same in the U.S. Mail, postage prepaid,

this 4th day of June, 1993

s/ T. Gordon Sanders
T. Gordon Sanders Attorney
Attorney

Appendix B

ORDER

IT IS HEREBY ORDERED, that plaintiffs, Paul Doucet, Sr., Debra Doucet, Russell Doucet, Michael Doucet and third party plaintiff Herbert Champagne, Jr. appear on the 14 day of June, 1993, to show cause why the Motion in Limine should not be granted and that plaintiffs and their experts, should not be prohibited from entering into evidence, referring to, or using in any manner or purpose, any report, survey, schedule, list, or data compiled for the purpose of identifying, or evaluating, or planning safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144, 152 of title 23 U.S. Code Annotated Section 409 or as attached as per Exhibit A and B.

SO ORDERED, this __ day of _____, 1993, Covington, Louisiana.

_____

JUDGE

PLEASE SERVE NOTICE OF HEARING ON

Douglas M. Schmidt
Peter R. Borstell
335 City Park Avenue
New Orleans, LA 70119

Nancy Yeager
501 N. Columbia
Mandeville, LA 70448

Appendix B

EXHIBIT A

BRIDGE INSPECTION REPORTS WITH ATTACHMENTS

Documents	Approval date	No. of pages
1. Structural inventory and appraisal report	12/3/86	1

Appendix B

EXHIBIT B

HIGHWAY ACCIDENT SAFETY DATA

Documents	Approval date	No. of pages
1. Accident data complied by mile post pursuant to 23 US 409 to determine abnormal accident locations	all years	
2. Correspondence of Thomas Richardson to Louis Garrido and attached computerized listing for accident data for the years 1976 thru 1985	12/1/86	34
3. Interdepartment memorandum from Louis Garrido to Henry Barousse	8/15/88	1

APPENDIX C — JUDGMENT OF THE 22ND JUDICIAL DISTRICT COURT, STATE OF LOUISIANA DATED MAY 13, 1993

NO: 92-11043 DIV "E"

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

PAUL DOUCET, ET AL

VERSUS

HERBERT CHAMPAGNE, JR., ET AL

FILED May 12, 1993 Carol King
DEPUTY CLERK

JUDGMENT

This matter came on for hearing before this Honorable Court on the 10th day of May, 1993 on a motion in limine to exclude certain reports filed by the defendant, Department of Transportation and Development. Present were:

Peter R. Borstell and Wayne E. Garrett, attorneys for Paul Doucet, Russell Doucet and Michael Doucet and their spouses, and

T. Gordon Sanders, Reed & Caire, attorney for the Louisiana Department of Transportation and Development.

Appendix C

The Court having reviewed the evidence offered, the oral argument of counsel, the memoranda submitted and the record of this matter rules as follows:

IT IS ORDERED ADJUDGED AND DECREED that the Bridge Inspection Report's approved July 26, 193, May 7, 1984, May 14, 1985, August 2, 1989 and November 5, 1991 and the lydrographic survey dated February 1, 1991, all submitted as State Exhibit "A" at the hearing of this matter are inadmissible and nondiscoverable pursuant to the provisions of 23 USCA 409.

JUDGMENT READ, RENDERED AND SIGNED this 13 day of May, 1993 at Covington Louisiana.

s/ A. Clayton James
JUDGE A. CLAYTON JAMES
DISTRICT COURT JUDGE, 22ND JDC

[stamped]
A TRUE COPY
Prepared and submitted by:
T. Gordon Sanders
La. Bar No. 11705
(504) 892-9295

[stamped]
s/ Carol King
DY. CLERK 22nd Jud. Dist. Court
ST. TAMMANY PARISH